Supreme Court U.S.
FILED
JUL 23 1997
CLERK

No. 97-4

In The

Supreme Court of the United States

October Term, 1996

FIREMAN'S FUND INSURANCE COMPANY, INC.,

Petitioner,

vs.

PAINEWEBBER REAL ESTATE SECURITIES, INC.; PAINEWEBBER GROUP, INC.; PAINEWEBBER INCORPORATED; and PAINEWEBBER MORTGAGE FINANCE, INC.,

Respondents.

Petition For Writ Of Certiorari To Court Of Appeal For The State Of California, First Appellate District

BRIEF IN OPPOSITION

RECEIVED
JUL 30 1997
OFFICE OF THE CLERK
SUPREME COURT, U.S.

JAMES P. BENNETT
Counsel of Record
JOHN SOBIESKI

MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California
94105-2482
Telephone: (415) 268-7000

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

27 pp

TABLE OF CONTENTS

Page

REASONS FOR DENYING THE WRIT 1

I. SUMMARY OF ARGUMENT 1

II. THE QUESTION FIREMAN'S ASKS DOES NOT WARRANT CERTIORARI 3

A. This Court Has Already Decided That a Defendant's Wealth Can Be Considered in Awarding Punitive Damages, and There is No Reason to Reconsider That Conclusion 3

B. Fireman's Contention That the Unpublished Decision in This Case Conflicts With the *BMW* Guideposts Does Not Provide Any Basis for Certiorari, and Is, in Any Event, Without Merit 6

C. The Degree of Fireman's Reprehensibility Was Incomparably Greater Than in *BMW* .. 7

1. This case involves intentional economic injury 7

2. Fireman's acted with malicious bad faith 9

3. Fireman's repudiated its policy obligations 11

4. Fireman's attempted to conceal its wrongdoing 11

5. Fireman's sought to take advantage of PaineWebber's adverse position 12

6. Fireman's threatened to do the same thing again 12

TABLE OF CONTENTS – Continued

Page

D. Due Process Notice Concerns Are Also Satisfied by the Fact That the Punitive Damage Award Is Less Than the Actual and Threatened Harm..... 14

E. California's Relatively Low Sanctions for Comparable Misconduct Did Not Deprive Fireman's of Fair Notice..... 16

F. The California Court of Appeal's Discussion of the Reprehensibility of Fireman's Conduct Does Not Raise Any Due Process Concerns..... 17

III. THE QUESTION FIREMAN'S ASKS WAS NOT PROPERLY PRESENTED TO CALIFORNIA'S APPELLATE COURTS..... 18

A. Fireman's Deprived the California Courts of the Opportunity to Consider the Question It Asks This Court to Decide..... 18

B. Fireman's Did Not Timely Present Its Constitutional Claim to the California Appellate Courts..... 19

IV. CONCLUSION..... 22

TABLE OF AUTHORITIES

Page

CASES

Adams v. Robertson, ___ U.S. ___, 137 L. Ed. 2d 203, 117 S. Ct. 1028 (1997) 19

BMW of North America, Inc. v. Gore, ___ U.S. ___, 134 L. Ed. 2d 809, 116 S. Ct. 1589 (1996)..... *passim*

Charter Oak Fire Ins. Co. v. Color Converting Industries Co., 45 F.3d 1170 (7th Cir. 1995)..... 9

Comunale v. Traders & Gen'l Ins. Co., 50 Cal. 2d 654, 328 P.2d 198 (1958)..... 8

Continental Trend Resources, Inc. v. Oxy USA, Inc., 101 F.3d 634 (10th Cir. 1996)..... 16

Cummings Medical Corp. v. Occupational Medical Corp., 10 Cal. App. 4th 1291, 13 Cal. Rptr. 2d 585 (1992)..... 14

Doser v. Middlesex Mutual Ins. Co., 101 Cal. App. 3d 883, 162 Cal. Rptr. 115 (1980)..... 10

Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981)..... 16

Miller v. Elite Ins. Co., 100 Cal. App. 3d 739, 161 Cal. Rptr. 322 (1980)..... 5

Neal v. Farmers Insurance Exchange, 21 Cal. 3d 910, 148 Cal. Rptr. 389 (1978)..... 5

Neighbours v. Buzz Oates Enterprises, 217 Cal. App. 3d 325, 265 Cal. Rptr. 788 (1990)..... 19

Opsal v. United Services Auto. Ass'n, 2 Cal. App. 4th 1197, 10 Cal. Rptr. 2d 352 (1991)..... 10

Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 113 L. Ed. 2d 1, 111 S. Ct. 1032 (1991)..... 1, 3, 4, 5, 21

TABLE OF AUTHORITIES – Continued

Page

Pulla v. Amoco Oil Co., 72 F.3d 648 (8th Cir. 1995) 18

TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 125 L. Ed. 2d 366, 113 S. Ct. 2711 (1993) 1, 4, 5, 14, 15

CODES

California Insurance Code § 790.03(h)(5) 8

RULES

California Rules of Court

Rule 29(b)(1) 21

Rule 977(a) 6

RESPONDENTS' BRIEF IN OPPOSITION

Respondents PaineWebber Real Estate Securities, Inc.; PaineWebber Group, Inc.; PaineWebber Incorporated; and PaineWebber Mortgage Finance, Inc. ("PaineWebber") request that the Court deny the petition for certiorari submitted by Fireman's Fund Insurance Company, Inc. ("Fireman's").

REASONS FOR DENYING THE WRIT

I. SUMMARY OF ARGUMENT

First, the question Fireman's asks – whether a defendant's wealth can be considered in determining the appropriate amount of punitive damages – was implicitly decided in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 125 L. Ed. 2d 366, 113 S. Ct. 2711 (1993). Both the plurality and Justice Kennedy, concurring in part, concluded that the defendant's wealth was one of the factors that demonstrated that the punitive damage award was not excessive, and hence did not violate due process. Similarly, in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 21-22, 113 L. Ed. 2d 1, 111 S. Ct. 1032 (1991), the Court concluded that the six factors that the Alabama appellate courts considered (which included the defendant's wealth) provided an appropriate framework for evaluating punitive damages. *BMW of North America, Inc. v. Gore*, ___ U.S. ___, 134 L. Ed. 2d 809, 116 S. Ct. 1589 (1996) ("*BMW*") did not reject these conclusions; it simply held that an award could not be based solely on wealth.

Second, even if, arguendo, Fireman's were right in arguing that the decision below violated that rule, certiorari should not be granted simply to apply existing law, and that is especially true in a case such as this, which involves an *unpublished* intermediate appellate decision that did not discuss the federal issue, and that has no precedential weight.

Third, California's reason for considering a defendant's wealth in evaluating punitive damages – to make sure that the award will be neither too large nor too small to impose the appropriate degree of punishment and deterrence for that defendant – is clearly within the bounds of reason permitted by the Due Process Clause.

Fourth, the facts in the lengthy trial court record, which this Court would have to review if it granted certiorari, show that Fireman's engaged in highly reprehensible conduct that resulted in actual and threatened harm that exceeded the punitive damage award. This case does not involve the innocent and good faith conduct that petitioner portrays. Fireman's course of conduct involved calculated and intentional bad faith, with numerous aggravating factors, that not only inflicted actual harm of $3 million – with a corresponding profit for Fireman's – but that threatened to inflict harm of $25 million or more on PaineWebber, while producing a $25 million benefit for Fireman's. In these circumstances, the imposition of a $21 million punitive damage award against a defendant with a $2.7 billion net worth does not offend fundamental notions of fairness. To require a jury to impose the same amount for purposes of punishment and deterrence on a company with vast wealth that it would otherwise

impose on a company with modest resources would be a travesty.

Fifth, Fireman's effectively told the California courts that the question it now asks this Court was not an issue. Fireman's has therefore deprived the state courts of an opportunity to consider that question, and it has deprived this Court of the benefit of their views. Further, Fireman's did not properly present any federal constitutional claim to the California appellate courts. California requires that the arguments for reversing a judgment must be presented in the appellant's opening brief, but Fireman's did not argue that the award violated federal constitutional limits until its supplemental reply brief.

II. THE QUESTION FIREMAN'S ASKS DOES NOT WARRANT CERTIORARI

A. This Court Has Already Decided That a Defendant's Wealth Can Be Considered in Awarding Punitive Damages, and There is No Reason to Reconsider That Conclusion

In *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 at 21-22, this Court concluded that the six factors (including the defendant's financial position) that the Alabama courts considered in reviewing punitive damage awards provided for a "rational relationship in determining whether a particular award is greater than reasonably necessary to punish and deter." *Id.*, 22. Justice O'Connor, dissenting, argued, *inter alia*, that it would have been fairer to require the jury to consider the defendant's financial position. *Id.*, 51-52.

In *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, the plurality stated that "petitioner's wealth" was one of the factors that demonstrated that the $10 million punitive damage award was not so excessive as to be beyond the state's power (*id.*, 462), and that factors such as wealth were typically considered under "well-settled law." *Id.*, 462 n. 28. Justice Kennedy, concurring in part, stated that the punitive damage award was justified, in part, because of the evidence of "TXO's vast financial resources and . . . that TXO would suffer only as a result of a large judgment." *Id.*, 469. Justice O'Connor, with Justices White and Souter, dissenting, did not take the position that consideration of a defendant's wealth was unconstitutional, noting that historically, "the wealth of the perpetrator long has been thought relevant," but that courts should recognize the risk of jury bias against out-of-state defendants where there is a large award for which there is no other explanation. *Id.*, 491-495.[1]

The rule established by *Haslip* and *TXO* should not be reconsidered. There is nothing in the concept of due process that prevents a state from considering a defendant's wealth – together with the reprehensibility of its conduct and the harm that was inflicted and threatened – in assessing punitive damages. A state has an obvious and legitimate interest in including the defendant's wealth in the factors that are considered, because that will help to make sure that the amount assessed against a particular defendant is neither too large nor too small to

---

[1] That risk did not exist in this case, however, because the wrongdoer was a California corporation, whereas the victims were Delaware corporations.

impose the degree of punishment and deterrence that that defendant's wrongdoing warrants. As the California Supreme Court explained in *Neal v. Farmers Insurance Exchange*, 21 Cal. 3d 910, 928, 148 Cal. Rptr. 389 (1978):

> "[O]bviously, the function of deterrence . . . will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. [Citations omitted.] By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter."

Fireman's contention that a defendant does not receive fair notice of the severity of the punitive damages that may be awarded if its wealth can be considered (petn., 8) is a non sequitur that it does not explain. Wrongdoers in California have been on notice for years that their financial condition was one of the factors that would be considered in setting an appropriate level of punitive damages. *See, e.g., Neal v. Farmers Insurance Exchange*, 21 Cal. 3d 910 at 928.[2]

Nor does *BMW* provide any basis for reconsidering the decisions in *Haslip* and *TXO* that a defendant's wealth

---

[2] As a California-based insurer, Fireman's was on notice of California's use of substantial awards of punitive damages to punish and deter the kind of misconduct in which it engaged (*Neal v. Farmers, Ins. Exchange*, 21 Cal. 3d 910; *Miller v. Elite Ins. Co.*, 100 Cal. App. 3d 739, 161 Cal. Rptr. 322 (1980) (punitive damages for insurer's arbitrary refusal to settle), and that California courts would take into account the reprehensibility of its conduct *and* the amount of harm it inflicted and threatened, along with its financial condition. *See Neal v. Farmers Insurance Exchange*, 21 Cal. 3d 910.

can be considered in evaluating punitive damages. *BMW* simply concluded on this issue that the amount of a punitive damage award cannot be justified solely by a defendant's wealth where none of the guideposts it identified gave fair notice of the magnitude of a potential award. *BMW*, 116 S. Ct. at 1604.

B. Fireman's Contention That the Unpublished Decision in This Case Conflicts With the *BMW* Guideposts Does Not Provide Any Basis for Certiorari, and Is, in Any Event, Without Merit

Even if, arguendo, Fireman's analysis of the factual basis for the award against it were correct, its claim that the punitive damage award violated the *BMW* guideposts would not warrant certiorari. Moreover, this Court would not have the benefit of the California courts' analysis of the application of the *BMW* guideposts, or of the specific question that Fireman's raises, because Fireman's did not properly present its constitutional claim in the California courts, and it told those courts that the question it now wants this Court to decide was not an issue. *See* Sec. III, below.

Nor is there any need to grant certiorari to clarify the application of the law. The California Supreme Court determined only that Fireman's petition for review was "denied." App. C. The Court of Appeal did not discuss the *BMW* decision; it did not discuss any federal issue; and it did not order its opinion published in California's Official Reports. *See* App. A, 1, 26-29. That Court's opinion, therefore, has no precedential value in California or elsewhere. *See* Cal. Rules of Court, Rule 977(a) ("[a]n

opinion that is not ordered published shall not be cited or relied on by a court or a party . . . [except on issues involving law of the case, res judicata, collateral estoppel, or criminal or disciplinary matters]").

In addition, Fireman's contention that the sole justification for the punitive damage award was its $2.7 billion net worth (petn., 8), is without merit. There are numerous misstatements and omissions in Fireman's petition on that issue. The evidence from the 45 days of trial – construed favorably to the verdict, as it must be – shows calculated insurer bad faith and malice, accompanied by numerous aggravating factors, that inflicted $3 million in actual harm, that threatened its insured with potential harm of more than $25 million, that produced an immediate ill-gotten gain for the insurer of at least $3 million, and that potentially could have saved it as much as $25 million. In short, there was no violation of *BMW's* requirements.

C. The Degree of Fireman's Reprehensibility Was Incomparably Greater Than in *BMW*

1. This case involves intentional economic injury.

Fireman's goal was to deprive PaineWebber of all benefits under its $25 million policy, and it actually succeeded in depriving PaineWebber of $3 million in policy benefits. *BMW* notes that the intentional infliction of economic injury through affirmative acts of misconduct can warrant a substantial penalty. *BMW*, 116 S. Ct. at 1599. In contrast, the $4,000 injury to Dr. Gore, and the $56,000 in total injuries to all Alabama residents, resulted

from non-disclosure. (*Id.* at 1601.) Thus, the actual and threatened harm was more than 446 times greater in this case than in *BMW*, even though BMW's misconduct had been directed against several Alabama residents.

Fireman's statement that "[t]he wrongdoing involved in this case was [its] decision not to contribute to the settlement . . . . (App. A-1)" (petn., 2), is not supported by its record cite, and is a gross understatement of the malicious course of conduct on which the punitive damages were based.

Fireman's insured PaineWebber for $25 million in excess coverage for liability for slander, but not for breach of contract. App. A, 1. A third party, Homestead, sued PaineWebber for both slander and breach of contract for destroying Homestead's mortgage servicing business. *Id.*, 3. After the trial court indicated that liability had been established (*id.*, 11), Homestead put on evidence of lost profits damages from this business of between $85 million and $158 million. *Ibid.* By June 1987 PaineWebber's potential liability for covered damage in excess of Fireman's policy limits was reasonably clear.

Under the circumstances, Fireman's was clearly obligated under California law to take all reasonable steps to assist PaineWebber in the settlement of the *Homestead* suit. *Comunale v. Traders & Gen'l Ins. Co.*, 50 Cal. 2d 654, 328 P.2d 198 (1958); California Ins. Code § 790.03(h)(5). Instead of honoring its obligations, Fireman's purposefully ignored them, and with calculation attempted to take advantage of PaineWebber's adverse position in order to escape from all liability under its policy.

Fireman's scheme was simple: knowing that PaineWebber wanted to settle the underlying action (and likely would with or without its insurer's help), Fireman's took the position that it was not obligated to contribute *or even consent* to its insured's settlement. Thus, Fireman's wrongfully refused to consent to PaineWebber's settlement of the *Homestead* case (App. A, 22), hoping to induce PaineWebber to settle and so that it could then invoke the "voluntary-payments" clause to excuse itself from ever having to pay. *Charter Oak Fire Ins. Co. v. Color Converting Industries Co.*, 45 F.3d 1170, 1176 (7th Cir. 1995). Yet Fireman's knew this would be bad faith. 22 R.T. 2445.

Nevertheless, Fireman's refused to contribute to the settlement, thereby forcing PaineWebber to fund the settlement entirely with its own funds – except for $1 million from its primary insurer. Fireman's then used that settlement without its consent to claim that PaineWebber had lost its coverage for the *Homestead* case.

2. Fireman's acted with malicious bad faith.

Fireman's statements that its conduct "was founded on a good faith belief that it had a contractual right to do precisely what it did," and that "[i]t arrived at that belief from California case law . . . . " (petn., 13) are not supported by any cite to the record, and are wrong. An examination of the entire trial court record will show that Fireman's knew that it had no right to arbitrarily and unreasonably refuse to contribute or consent to settlement, but nevertheless, with calculation, proceeded to do so; that the reason that Fireman's gave for its actions, that there was "no evidence of covered damages" was a mere pretext – there was "[s]olid evidence" of damages that

contrary to its implied contention that it acted in good faith reliance on California law (petn. 13), Fireman's refused to disclose the advice, if any, that its attorneys had given it, and that all evidence on that issue was precluded (7 C.T. 2537-96; 9 C.T. 2913-22; 10 C.T. 3250-54; 4 R.T. 28; 5 R.T. 450; 24 R.T. 2564-67, 2573); that it did not assert the reliance on counsel defense (App. A, 8); and that instead of telling the jury that Fireman's relied on the genuine issue defense, its claims executive (Beck) testified that he believed that he had a duty to respond appropriately if the claim had invaded Fireman's coverage. 21 R.T. 2280-83; 22 R.T. 2368-69, 2445.[3] The record shows, however, that Beck had adopted a policy of conscious ignorance, and that he denied consent to settlement without examining the evidence that PaineWebber's attorneys provided, even though he knew he had a duty to do so.[4]

---

[3] Fireman's reliance on California's genuine issue defense, and cases such as *Doser v. Middlesex Mutual Ins. Co.*, 101 Cal. App. 3d 883, 162 Cal. Rptr. 115 (1980), and *Opsal v. United Services Auto Ass'n*, 2 Cal. App. 4th 1197, 10 Cal. Rptr. 2d 352 (1991) (petn., 4, 13-14) is therefore irrelevant. There was no evidence that Fireman's had a good faith belief that it had a right to act unreasonably.

Contrary to the implication in Fireman's statement that consent to settle clauses had been upheld at the time that it refused to settle (petn., 3-4), no California court had held that that clause permitted insurers to refuse to settle arbitrarily and unreasonably. An argument similar to Fireman's had been rejected as early as 1963. App. A, 20.

[4] Beck knew he had to make an "honest, fair and intelligent" evaluation of the case before rejecting a settlement request (21 R.T. 2257-58), and that that required an evaluation of the credibility of the testimony (22 R.T. 2412), but he did not

In short, Fireman's did not have a reasonable basis for its actions (App. A, 19-20); the Court of Appeal found that "[t]he only explanation for its conduct was that it hid its head in the sand or was solely motivated by close-fisted intractability." *Id.*, 24-25. In contrast, there was no evidence that BMW acted in bad faith. *BMW*, 116 S. Ct. at 1601.

3. Fireman's repudiated its policy obligations.

Fireman's statement that it "did not deny coverage. . . . (App. A-11)" (petn., 3), is irrelevant. The facts stated by the Court of Appeal – that Fireman's "wrongly insisted that it could unreasonably refuse" to approve a settlement and need not pay until a judgment, but that it would not be bound by a judgment that found covered damages for slander (App. A, 27; *see also id.*, 12-13, 14) – are equivalent to a denial of coverage, because Fireman's repudiated its policy obligation to pay a covered judgment after trial.

4. Fireman's attempted to conceal its wrongdoing.

Fireman's statement that its conduct did not involve fraud (petn., 5), is misleading. While the jury found that PaineWebber did not prove fraud by clear and convincing evidence, Fireman's attempted to conceal its wrongdoing

---

even familiarize himself with the evidence Homestead was presenting before rejecting PaineWebber's settlement requests. 21 R.T. 2304-07; 22 R.T. 2340, 2387-91, 2407-08.

by falsely claiming that PaineWebber's attorney had conceded that there was no evidence of covered damages. *See* App. A, 13, 14 (describing Fireman's letters with the claimed concessions). This "seriously mischaracterized" PaineWebber's position. App. A, 27. Indeed, Fireman's claims executive admitted that these letters misrepresented PaineWebber's attorney's evaluation of the case. 22 R.T. 2457-58. Thus, by attempting to hide its misconduct, Fireman's engaged in conduct that *BMW* says will justify a higher award. *BMW*, 116 S. Ct. at 1601.

5. Fireman's sought to take advantage of PaineWebber's adverse position.

Fireman's statement that the victim of its misconduct was not financially vulnerable (petn., 13), is both unsupported and wrong. PaineWebber's financial position was extremely vulnerable, because it faced a double barreled threat – if the case was not settled – of an adverse judgment well in excess of $25 million for both covered and non-covered damages. As the court below stated, Fireman's "only response [to the demand for settlement] was to take advantage[ ] of PaineWebber's adverse position . . . . " App. A, 27. As *BMW* notes, the defendant's financial vulnerability can warrant a substantial penalty. *BMW*, 116 S. Ct. at 1599.

6. Fireman's threatened to do the same thing again.

Fireman's statement that there was no evidence of "recidivist conduct" (petn., 5), is highly misleading.

Fireman's carried out its tortious scheme in the face of vigorous protests that it steadfastly ignored, and it expressed no remorse. To the contrary, it told the jury that it had done nothing wrong, that it was following its normal practices, and that it would do the same thing again if the opportunity arose. 22 RT 2464. In contrast, BMW immediately instituted a nationwide program of full disclosure whenever any of its new cars had been repainted. *BMW*, 116 S. Ct. at 1601, n. 31.

Thus, the facts that Fireman's scheme – if it had succeeded – would have been immensely profitable for Fireman's and would have inflicted an even greater loss (see sec. B, below), that it was carried out in the face of vigorous protests, that a very senior claims official expressed a willingness to do the same thing again, and that Fireman's attempted to conceal its wrongdoing, all demonstrate a very high degree of reprehensibility and the need for a severe sanction for purposes of punishment and deterrence.

When these factors are considered in the light of Fireman's $2.7 billion net worth, there can be no doubt that an award of $21 million – an amount that is $4 million less than PaineWebber's potential loss and Fireman's potential gain – is clearly appropriate, and does not raise any question of fair notice.

D. Due Process Notice Concerns Are Also Satisfied by the Fact That the Punitive Damage Award Is Less Than the Actual and Threatened Harm

Fireman's malicious infliction of $3 million in actual harm shows, by itself, that a very substantial punitive award was needed for punishment and deterrence, especially since Firemans reaped an immediate $3 million reward for its wrongdoing.

Moreover, the threatened harm was far greater than the actual harm. Fireman's statement that "the threat of harm was slight . . . . " (petn., 6), is not supported by any record cite, and is wrong. If Fireman's refusal to consent had prevented a settlement, there was a substantial likelihood that Homestead would have prevailed at trial, because its case was comparatively strong, while the defense had a weak potential. App. A, 24. There was also solid evidence of damages well in excess of covered Fireman's $25,000,000 policy limits. *Ibid*. Yet Fireman's threatened that it would not pay a judgment for slander even if one was entered. App. A, 27. Thus, the potential gain that Fireman's was seeking from its wrongdoing was also $25 million.

These factors provide powerful support for the jury's $21 million punitive damage award, because such awards should be high enough to eliminate the incentive for wrongdoing. *Compare TXO*, 509 U.S. 443, 462 (the potential harm to the plaintiff if defendant's scheme had succeeded may be considered); and *Cummings Medical Corp. v. Occupational Medical Corp.*, 10 Cal. App. 4th 1291, 1299,

13 Cal. Rptr. 2d 585 (1992) (the profitability of the defendant's misconduct may be considered). BMW's non-disclosure policy, on the other hand, did not threaten any potential harm beyond the actual damages that were inflicted. *BMW*, 116 S. Ct. at 1602.

Four years ago, this Court in *TXO* affirmed a $10 million punitive damage award in a case involving not only purely economic harm, but also a corporate plaintiff who was not financially vulnerable. The $10 million award represented 526 times the actual damages and 10 times the $1 million in threatened or potential harm which the plurality conservatively calculated. The plurality explained that the constitutional concern raised by the ratio of punitive to actual damages "[d]issipates when one considers the potential loss to respondents, . . . had petitioner succeeded in its illicit scheme." *TXO*, 509 U.S. at 462.

This "refined" application of the reasonable relationship test was approved in *BMW* as the Court's second "guidepost." The application of that test here demonstrates beyond any question that the punitive damage award was constitutionally reasonable – and hence that Fireman's received fair notice of the severity of the potential sanction – because the ratio in this case between the $21 million in punitive damages and the $25 million in actual and threatened harm (*i.e.*, the full policy limits) was less than one-to-one.

E. California's Relatively Low Sanctions for Comparable Misconduct Did Not Deprive Fireman's of Fair Notice

Unlike the situation in *BMW*, where none of the guideposts that the Court discussed gave BMW any notice of the magnitude of the punitive damages that could be awarded, the two guideposts discussed above gave Fireman fair notice of the punitive damage award that could be imposed for its misconduct. Further, California has not made a legislative judgment that the relatively small civil sanctions that can be imposed for an insurer's violation of its duties should be considered in imposing punitive damages. To the contrary, California insurers have been on notice for years that potential punitive damage awards are not related in some way to the civil sanctions for comparable misconduct. As pointed out in *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 820, 174 Cal. Rptr. 348 (1981), the relatively small size of comparable civil penalties does not preclude a large punitive damage award for serious misconduct.

> "It is precisely because monetary penalties under government regulations prescribing business standards or the criminal law are so inadequate and ineffective as deterrents against a manufacturer and distributor of mass produced defective products that punitive damages must be of sufficient amount to discourage such practices." *Id.*[5]

---

[5] *See also Continental Trend Resources, Inc. v. Oxy USA, Inc.*, 101 F.3d 634, 641 (10th Cir. 1996) (while the state must provide fair notice of the potential for a large punitive damage award, it is not required to do so through its applicable statutory penalties).

F. The California Court of Appeal's Discussion of the Reprehensibility of Fireman's Conduct Does Not Raise Any Due Process Concerns

Fireman's contention that that court's "entire analysis" of the excessiveness issue appears in the two paragraphs that Fireman's quotes (petn., 7), is without merit. While the court devoted only one sentence at that point to the reprehensibility of Fireman's conduct, it had already addressed the evidence of Fireman's malice. App. A, 26-27. It concluded there that Fireman's conduct was "especially egregious," finding as aggravating factors that Fireman's "completely disregarded": (i) "the long-established law,"[6] (ii) the testimony in the case, (iii) the evaluation of the attorneys who were present at trial, (iv) the evaluation of the primary carrier, and (v) its own guidelines on how to conduct an investigation. App. A, 27.

This was not all. The court noted that Fireman's ignored "persuasive, valid arguments"; that it "seriously mischaracterized" PaineWebber's position; that Fireman's wrongly insisted that it could unreasonably refuse to settle while at the same time refusing to be bound by the judgment if the case proceeded to trial; and that it attempted to take advantage of PaineWebber's adverse position. *Ibid.* Further, this discussion of Fireman's malice was built on an analysis of the numerous factors that

---

[6] The long-established law that Fireman's disregarded was the law concerning liability for slander (App. A, 18-19, 24), not, as Fireman's suggests, the law governing the genuine issue defense.

indicated Fireman's bad faith (*id.*, 23-25), which, in turn, was based on an extensive discussion of the facts. *Id.*, 8-16. There was no need for the court to reiterate these analyses in discussing the amount of punitive damages.

III. THE QUESTION FIREMAN'S ASKS WAS NOT PROPERLY PRESENTED TO CALIFORNIA'S APPELLATE COURTS

A. Fireman's Deprived the California Courts of the Opportunity to Consider the Question It Asks This Court to Decide

Fireman's effectively told the California courts that the federal constitutional question it now presents to this Court was not in issue in this case. It expressly told both the Court of Appeal and the California Supreme Court that a defendant's wealth *could* be considered in deciding the amount of punitive damages. In the Court of Appeal, Fireman's noted without protest that California's criteria for evaluating the excessiveness of an award included "the wealth of the particular defendant" (reply brief, 32), and it expressly conceded that its wealth could be considered, stating that its "purported '$2.7 billion net worth' " is "a factor to consider" in evaluating the excessiveness of punitive damages under California law, although it is "not a key consideration." Supplemental reply brief, 12, emphasis omitted.

Fireman's made essentially the same concession in the California Supreme Court, citing and quoting Justice White's opinion in *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 659 n. 16 (8th Cir. 1995) for the proposition that " 'a defendant's wealth may be taken into account in order to

ensure that an award will adequately deter any future such conduct . . . . ' " App. G, 8.

For Fireman's to ask this Court to decide an issue that it effectively told both state appellate courts did not exist devalues the role of the state courts in our federal system, and deprives this Court of the benefit of their views. This type of gamesmanship in bypassing the state courts should not be rewarded in the absence of a compelling reason for doing so.

B. Fireman's Did Not Timely Present Its Constitutional Claim to the California Appellate Courts

Fireman's simply states that it asserted "its constitutional challenge to the punitive damage award in the Court of Appeal [citing to its *supplemental reply* brief] and in its petition for review by the California Supreme Court." (Petn. 6.) Ignoring *Adams v. Robertson*, ___ U.S. ___, 137 L. Ed. 2d 203, 117 S. Ct. 1028 (1997). Fireman's does not discuss whether it complied with California's briefing standards, or why its failure to do so would not be an adequate and independent state ground for California's refusal to consider its federal claim.

Fireman's should have raised all of its arguments against the punitive damage award in its opening brief on appeal. *See, e.g., Neighbours v. Buzz Oates Enterprises*, 217 Cal. App. 3d 325, 335 n. 8, 265 Cal. Rptr. 788 (1990) (" 'Obvious considerations of fairness . . . demand that the appellant present all of his points in his opening brief. . . . [P]oints raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before.' ").

Fireman's violated that rule by presenting its attack on punitive damages on three separate installments.

- It argued in its opening brief that there was no evidentiary basis under state law for punitive damages;
- It did not argue until its reply brief that the award was excessive under *state* law standards;
- It did not argue until its supplemental reply brief that the award was excessive under federal constitutional standards;
- It did not raise in any California court its contention that a defendant's wealth could not be considered; it waived the issue by telling the state courts that wealth could be considered.

In short, Fireman's committed three consecutive violations of California's briefing standards.

The Court of Appeal excused the first. It denied PaineWebber's motion to strike or disregard the section of Fireman's reply brief that challenged the amount of the award under state law, and it granted both parties leave to file a supplemental brief. However, Fireman's did not ask for a *second* waiver of the state's briefing standards (*see* Fireman's opposition to motion to strike), and the court did not say that it could raise another new argument against the award in its supplemental reply brief.

The fact that this Court did not decide *BMW* until after Fireman's had filed its reply brief, did not excuse Fireman's failure to raise its federal constitutional challenge to the amount of the award in its opening brief, or

at the very latest when it challenged that amount on state law grounds in its reply brief. It was clearly established when Fireman's filed its opening brief that the Fourteenth Amendment limited the permissible size of a punitive damage award, and Fireman's had argued *in the trial court* that the award was excessive under *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (App., D 3). Indeed, this Court had granted certiorari in *BMW* before Fireman's filed its opening brief.[7]

The Court of Appeal therefore had an adequate and independent state law ground for refusing to consider Fireman's tardy federal constitutional claim.

Fireman's delayed presentation of its federal claim also provided an adequate and independent state ground for the California Supreme Court's refusal to consider it. *See* Cal. Rules of Court, Rule 29(b)(1) (as a matter of policy, the Supreme Court will not normally consider any issue that could have been but was not timely raised in the briefs in the Court of Appeal).

---

[7] PaineWebber called the court's attention in its supplemental respondent's brief to this Court's decision in *BMW of North America, Inc. v. Gore*, ___ U.S. ___, 134 L. Ed. 2d 809, 116 S. Ct. 1589. PaineWebber also noted that it was too late for Fireman's to raise a due process challenge to the amount of punitive damages, and that any such challenge would be without merit.

IV. CONCLUSION

For all of the above reasons, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

JAMES P. BENNETT
Counsel of Record
JOHN SOBIESKI

MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California
94105-2482
Telephone: (415) 268-7000

Counsel for Respondents